UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION

Case No. 12-2311

Hon. Marianne O. Battani

THIS RELATES TO:
ALL AUTO PARTS CASES

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OBJECTIONS TO RULE 30(b)(6) DEPOSITIONS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Thursday, June 23, 2016

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Detroit, Michigan
Thursday, June 23, 2016
at about 2:00 p.m.

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(Court and Counsel present.)

THE LAW CLERK: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

THE COURT: Good afternoon. All right. We have the objections today, so may I have the appearances of those who will start arguing anyway?

MR. WILLIAMS: Good afternoon, Your Honor. I won't be starting the argument but Steve Williams on behalf of the end payors.

MR. KASS: Your Honor, Colin Kass on behalf of Chrysler FCA, L.L.C. on behalf of the subpoenaed entities, the objecting parties.

THE COURT: And your name is?

MR. KASS: Colin Kass, K-A-S-S.

MR. HEMLOCK: Good afternoon, Your Honor. Adam Hemlock, Weil, Gotshal & Manges, on behalf of the defendants. We represent the Bridgestone and Calsonic entities.

MR. ASHBY: Joseph Ashby, Quinn Emanuel. I represent Hyundai Motor America and Hyundai AutoEver America, and arguing on behalf of the domestic distributors and the non-core subpoenaed entities.

THE COURT: Okay.

MR. CUNEO: Jonathan Cuneo on behalf of the auto dealers, Your Honor.

MR. WIENNER: May it please the Court, Tom Wienner on behalf of Hino Motor Manufacturing USA. Your Honor, at some point along the way I would like to have about two minutes, if I may?

THE COURT: All right.

MS. KINGSLEY: Good afternoon, Your Honor. Meredith Kingsley on behalf of HMMA and Hachi.

THE COURT: Okay.

MR. SURPRENANT: Good afternoon, Your Honor. Dominic Surprenant, Quinn Emanuel. I represent the 17 Daimler entities.

THE COURT: I'm sorry. How do you spell your last name?

MR. SURPRENANT: S-U-R-P-R-E-N-A-N-T.

THE COURT: Okay. Thank you.

MR. SCHERKER: May it please the Court, my name is Elliot Scherker. I represent Kia Motors Manufacturing Group, non-party.

We filed separate objections and I would request a few moments of the Court's time to address those objections unique to KMMG. Thank you.

MR. WALTERS: Afternoon, Your Honor. Neil Walters from Ballard Spahr for Subaru of America, Fuji USA and Subaru Leasing Corporation.

THE COURT: Okay.

MR. SPERL: Good afternoon, Your Honor. Andrew Sperl from Duane Morris representing the truck and equipment dealer plaintiffs.

THE COURT: Okay.

MS. SESSIONS: Good afternoon, Your Honor. Justina Sessions from Kekar & VanNest. I represent the Honda entities.

We did file a separate statement but I'm not planning to argue unless Your Honor has any questions specific to Honda. Thank you.

THE COURT: All right. I will ask you as you come up and before you begin your argument if you would please identify yourself again for me and for the record. Okay.

Who wants to start?

MR. KASS: Thank you, Your Honor.

THE COURT: I don't want to be the one to say one is more important than the other so that's why I let you decide.

MR. KASS: I appreciate it, and I think there are a number of issues. My name is Colin Kass from Proskauer Rose, and I represent Chrysler, which is technically FCA, L.L.C. I would like to argue on behalf the joint SSE brief, the specific subpoenaed entities, which is sort of a synonym for the OEMs because OEMs does not accurately describe the group of entities that were subpoenaed, so we have been calling ourselves the SSE.

We raised two kinds of objections, both jurisdiction objections to the Special Master's order and practical objections. The jurisdictional objections we believe are straightforward and nondiscretionary. The practical objections we believe are obvious and sensible and they should be sustained.

Before we get to those objections though I would like to provide a little bit of context about how we got here and why these objections are so important. You have heard from the parties about the, quote, OEM subpoena repeatedly without the presence of the OEMs themselves and the SSEs to explain how this came about and our side of the story. It begins about a year ago when we got the subpoena that the parties have called the uniform OEM subpoena. The Special Master having reviewed this subpoena called the subpoena the broadest subpoena ever served in the history of America, that means it is the broadest and most burdensome history (sic) in

the 4.5 billion years of the universe.

THE COURT: Is that true or was it just a point of exasperation?

MR. KASS: No, he looked -- I mean, it was not a point of exasperation. He looked at this subpoena and when you look at it it covers the entire automotive industry, it covers every aspect from the purchasing down to the supplies and everything in between. It covers 56 part categories, which is hundreds and thousands of parts, it covers every make and model of vehicle in the country, it covers every system that arguably can be linked through, even though there is no system that actually links them together, it covers all of the documents, it covers all of the documents relating to the purchasing, it covers basically everything the automotive industry, the OEMs, everything that they do. And so when we got this subpoena our jaws dropped, we didn't know what to do with the thing. It is impossible to actually comply with the subpoena the way it was written.

So what we did was we said okay, we have to do something. What should we do? Well, what we did is we talked to other SSEs that were subpoenaed and we said, okay, let's put our heads together here. You know, nobody has a monopoly on great ideas, let's figure out what to do, let's negotiate with the parties. So we called up the parties and we said let's negotiate. Let's figure out what do you really

need. What gaps in the information do you not have that you really need in order to litigate this case because what do they have? We know that they have all of the purchasing information, they are the ones that sold the parts. We know that they have an unbelievable amount of information about the actual RFPs that are at issue, they participated in every single one. They got all of the communications back and forth and, I mean, they have produced -- we don't have the access to it but we understand they produced millions of pages on these RFPs.

THE COURT: Do you think that in general the fact that somebody already has the information doesn't prevent a subpoena from seeking that same information?

MR. KASS: So our --

THE COURT: But there is the proportionality and there is the issue of the volume, and therefore in terms of the difficulty in obtaining the information and that balancing act do you think that's where this comes in?

MR. KASS: So there are two aspects of it. One is the proportionality aspect of it, and the fact they have most of the information that they really need in order to litigate this case weighs heavily on the proportionality analysis, but there is a second analysis and that's really what is core at issue today in this objection, which is under Rule 45 it is not just a proportionality standard, there is a provision in

there that says that the parties need to establish that the information -- they have a substantial need that cannot otherwise be met, that's a Rule 45 standard, and that is what distinguishes a party discovery, which is subject to just the proportionality standard, and non-party discovery, which is subject to a heightened standard.

THE COURT: And why you are arguing Rule 45?

MR. KASS: And that's exactly why we are arguing Rule 45. So it is not just a technical footfall on the part of the parties or the Special Master, it is actually part of a strategy of theirs and of ours to say does Rule 45 apply to the SSEs because if it does apply there is a different standard going forward and that's why we are here to address that issue.

THE COURT: Thank you.

MR. KASS: So when we got the subpoena what we did is we said we need to negotiate this and we have now talked a little bit about this, but what we did is we went to the parties and said what information do you need because we know you have the purchasing information, we know you have a lot of the RFP information, we know you have a reasonable sample of the downstream pricing information that covers virtually every make and model at issue from which a sample -- a statistical analysis could be performed. Now, you may not have every piece of transactional data on the downstream side

but you have a lot of it, you have a sample, okay, and that was one issue.

Another issue was what the parties are seeking is not just our invoice price or our basic price to the dealers, they are seeking every element of a transaction between us and the dealer, every element of a transaction between a dealer and an end user regardless of how remote that is. So, for example, insurance on a vehicle or a warranty, that impacts the insurance market. Okay. The concept that a piece of copper -- the price of a piece of copper that goes into the wire harness could somehow impact the insurance market for insurance on vehicles is not really reasonable and, in fact, the Special Master after he issued the order in our case he issued an order on April 19th that said information relating to incentives -- dealer incentives is irrelevant. Okay. So he already issued the order saying much of what the parties are seeking now is not relevant, it is too remote for it to be relevant even to the issue of passthrough.

THE COURT: Let me ask you a question because you used this phrase and I want to make sure I understand it. The RFP, we talk about RFQs --

MR. KASS: RFQs is fine, I mean the same thing.

THE COURT: Okay. I thought so but --

MR. KASS: So request for purchase, request for

quote, but RFQ is probably the right term.

Okay. So that was -- so that was our concern and we went to the parties and ultimately we said to the parties we have an offer of proposal for you, we have an offer of production for you that we are going to propose because we weren't getting an offer of production from the parties. We said, okay, what you are claiming that you need that you don't have on the purchasing side is you don't have non-defendant data. Okay. Now, there's a lot of reasons and we explained in our affidavits and our economist's affidavit as to why non-defendant data is not a suitable benchmark and is not really relevant in this case but we said look, you're saying you don't have it, you say you want it, we are willing to give that to you. Okay. And we said for downstream information what you really need is you need -- you know, you need to make sure that you have comprehensive MSRP information and we will give that to you too.

So we believed we had a pretty good offer at least as a starting point, and we gave it to the parties. A few weeks later on Christmas Eve they send back an e-mail and they just say we are at an impasse and we are going to move to compel. They didn't come back with another proposal, they just moved to compel. So then we filed our opposition. In our opposition we had 56 fact declarations, and those 56 fact declarations explain from each of the SSEs, each one of them,

we explained why it is that the information they either had it, it was irrelevant, the burdens associated with that information whether we had the information or not and, you know, and so we had 56 declarations and we had two economists' declarations as well.

The parties when they moved to compel they had no declarations, okay, and they didn't contest any of the fact declarations on their reply. They do have one economist's declaration in their reply but that was it.

So our factual presentation -- our overwhelming factual presentation stands unrebutted and that is how we went into the mediation -- the hearing on the motion to compel that started with a mediation. And during that mediation the Special Master recognized he doesn't have any information from the parties on these issues and so what he did was he said look, I'm going to let them cure this by ordering the SSEs to participate in these depositions. Now, there was no motion on these depositions -- there was no motion to compel testimony, there was no request for depositions prior to this, the parties did not avail themselves of the opportunity to subpoena and seek custodian information or discovery on discovery depositions, but the Special Master recognized that there was a gap and so he said SSEs, submit to this declaration, okay, to these depositions.

THE COURT: Depositions.

MR. KASS: So that's what brings us here today.

THE COURT: Okay.

MR. KASS: So the concept of a deposition -- so one of the issues here -- so that brings us to our objections and our objections are both jurisdictional and practical. So our jurisdictional objection, the first one is whether or not the Special Master can compel testimony in the absence of a Rule 45 subpoena and that's what we just talked about as to why -- why the Special Master decided not to do that.

Now, when we got the proposed order from the parties we recognized look, if you are going do it you need to do it through a subpoena and we put in that provision that said the parties can issue their subpoena -- can issue a subpoena, and the parties rejected that, and the Special Master just wholesale adopted the parties' proposed order, no explanation as to why our proposal to have it done through Rule 45 subpoena, any rationale for rejecting that. So you ask yourself --

THE COURT: He didn't do an opinion on this, he did an order?

MR. KASS: He just did an order but we submitted dueling orders so the Special Master had both our order and he had their order and he just adopted wholesale their order without explaining why the provisions that we added to cure this jurisdictional defect why he didn't accept that. So

there is no reason -- there is no rationale in the record as to why what he did was actually appropriate and why what we propose is inappropriate.

THE COURT: Well, he had heard discussions though and --

MR. KASS: There was no --

THE COURT: -- when he made his decision.

MR. KASS: There was no discussion on this issue. There was a discussion as to whether or not there should be depositions, and we discussed whether or not there should be depositions, but there was no discussion as to whether it should be through Rule 45 or through deposition notice at the hearing at the mediation. That came about because when we received the parties' proposed order we had assumed they were going to go through the round of subpoena but they did not so we tried to cure it, so we provided it to the Court and in providing our proposal we had an e-mail that sort of explained what the differences were and why our proposal was appropriate. So in response he just signed the -- you know, he effectively signed the parties' order, he didn't issue an opinion as to why he was taking their version and not our version.

THE COURT: And your argument is that then this deprived you of the opportunity to argue there is no special need?

MR. KASS: So, no, our position at this point is that it simply has to go through Rule 45, there are procedural protections in terms of the location of the depositions and other things, not the substantial need, which really goes to the document issue that we are going to face that down the road. The principal issue -- the key principal is whether Rule 45 governs or whether he can dispense with Rule 45 and treat us like parties, which we are not, and so that is the principal that we are here basically to argue -- to litigate.

And our view is that, in fact, the case law, the rules themselves make it clear that you have to proceed by a subpoena, the case law makes it clear, the commentary makes it clear, you always have to compel testimony through a subpoena if it is a non-party, the deposition notice is simply not enough.

THE COURT: Okay. So let's say that I agree with you, that you need a Rule 45 so they issue Rule 45 subpoenas, what's next?

MR. KASS: So that would cure that objection if they had done that. We have another jurisdictional objection. So our other jurisdictional objection is that the Special Master cannot actually compel testimony because there was no dispute referred to him concerning the compulsion of testimony. What was referred to him was a motion to compel

documents, and the -- neither Rule 53, the order of reference, or the order of referral on the motion to compel allows him to order or compel testimony. What he can do is he can say, look, I feel -- he can tell the parties, look, I feel like there is a dearth of information here, why don't you guys go avail yourself of other discovery tools like depositions, issue sort of an advisory opinion to let the parties say this is what you ought to do before I rule on your motion, he can do that, but what he did instead was he actually ordered us to participate in these depositions and that was a technical error, it is not within his jurisdiction to do that.

THE COURT: I'm not sure on that technical error. I don't think he can give you an advisory opinion, that's not --

MR. KASS: No, he can't give us an advisory opinion but what he can do is he can say I don't have enough information and the parties can then say let us go take depositions and he can say well, okay, in light of that I'm going to adjourn the motion until you renew it or something along those lines. That's the kind of thing he can do. And one of the cases the parties cite, I don't have the name but it is cited in my brief, that's exactly what happened, it was -- effectively the judge had said I need more information, let the parties avail themselves of whatever

discovery tools were available and then they came back and they renewed their motion. That's how this process is supposed to work. He simply does not have the authority under Rule 53 to compel depositions directly and so that is a second jurisdictional problem.

Now that too is in a sense curable because the parties can then issue their Rule 45 subpoenas and will participate in those depositions and we will be where we started, but as a technical matter we believe the Special Master exceeded his authority. Now, why is that important? It is important to us because, as I started out, this is the broadest subpoena in history, okay, we are subject to it, we are the ones that are going to have to go through the burden of complying with it, and our view is that our only protection in this case, our only protection, especially since we are not at every hearing, we don't have an opportunity to talk at every hearing, our only protection is the rules, and we say we want that -- we want those rules followed to a T because that's where we are going to find our protection. And if the Special Master feels that he has authority that he doesn't have we feel we might get hurt in the long run, so that is why we are making these jurisdictional arguments because even though they can be cured we want to go down the path of saying there are rules and we are going to follow those rules.

THE COURT: They can be cured and you're saying -- I think you're saying the Special Master can say to the parties, you know, you need Rule 45 -- I need more information and you could do it by Rule 45 depositions.

MR. KASS: Exactly, exactly, so that gets us to the jurisdictional issues. There is one other one concerning whether we have a right to object but I don't think it is worth spending the time here about that.

Let's go to the practical objections, and there are really two worth talking about. The first practical objection concerns the scope of these depositions if they were to take place. During the mediation and then during the hearing the Special Master made it clear that what he needed was more information concerning the location of the information that we had, the availability of that information, and the burden of collecting it. That's what he said he needed. Okay. The parties, what they had done during their 45-minute lunch break where they came up with these five topics that they wanted, they designed them to be as broad as they possibly could be, okay, and they were not limited to the location, availability and burden of getting the data. So we put into our proposed order that precise limitation that he actually spoke about at the mediation, at the hearing, okay, and we put that as a provision. The parties didn't like it, they struck it out, allowing them in

theory to go into the merits, increasing our burden of preparing for these deposition.

THE COURT: Let me ask you about that because I did -- too many papers here. I did have a question on that.

MR. KASS: Yes.

THE COURT: In the deposition order, which was page 6, and in it says -- I'm not quoting directly but it says the parties may take up to two depositions of up to 14 hours each, and then it lists a number of things.

MR. KASS: Right.

THE COURT: Now, is this -- these things to me are the content of what they want back in the original subpoena, right, the substance?

MR. KASS: In some sense. So what they are asking for -- so their original subpoena had something like 50 plus requests and it covered everything. This is sort of a shorthand to cover those things, and you can read these things as though they were asking about the location, availability and burden of getting the data.

THE COURT: That is what I want to ask. Is this meant to be -- where do you keep -- how do you keep your transactional purchase data?

MR. KASS: So that's what we think it ought to mean but you can read this differently, so we had a provision in our proposal that didn't change the topics at all, it just

had another provision that said it is limited to the location, availability and burden so it was just clarifying the scope of that because you can read procurement process can be anything, it can be very broad and it can go into the merits, it can go beyond just what information do you actually have, what are your systems. Okay. So we wanted that provision to limit the scope, to limit our preparation obligation, but also to limit the number of times we are going to be subject to depositions on exactly the same topic. This is not going to be -- these depositions are not going to be the last depositions in this case, they are going to want to get documents and after they get documents they are going to want to depose our witnesses on these topics, and we don't want to have to go through that twice. So what we want to do is have a clear delineation that says you can get location availability and burden now and then later we will do the merits.

THE COURT: And what do you think about -- this may have been GM's idea as I read about the written depositions.

MR. KASS: So I'm getting to that next, that's my next practical issue. So this one here gets us to just sort of overall scope of the deposition if they were to go forward. The next one is giving us more information about what will actually be covered at this deposition, and we had two proposals. The first one was let's proceed under

depositions by written question.

THE COURT: Rule 31.

MR. KASS: Rule 31, so that was our first proposal, and we did discuss that at the hearing and the Judge -- the Special Master didn't accept it, I don't believe there was any reason given but he didn't go down that road. We believe that would be a good approach because then we would actually have the questions, we can go research the answers, and then we can provide them the answers at the deposition because we will have had the questions.

Now, we think that when we are talking about discovery on discovery this is actually the most efficient way of getting them the core information that they need in order to participate and --

THE COURT: They are talking about you would like -- because there are two different things here. You would like written questions before you actually do an oral exam, or are you talking about you don't want the oral at all, you just want the Rule 31?

MR. KASS: So my understanding of how Rule 31 works, and I have not actually done deposition on written questions, but my understanding is you get the written questions and then you provide the answers orally is my understanding as to how you do it, but that's my reading of the rule, so we would be fine with that approach. We also

would be fine, we could do written answers as well, we could do it either way, but that's my understanding of how Rule 31 actually works.

THE COURT: I just want to make sure this is what you are proposing.

MR. KASS: Yes.

THE COURT: So you want the written questions and then you would proceed by deposition?

MR. KASS: Correct. The second alternative that we had because the parties say, look it doesn't give us the opportunity for follow-up, the second one that we said was this is what we actually proposed in our order, this was our fallback position in our proposed order, the fallback position was just give us your outline, you are going to prepare an outline for these depositions anyway, it will be probably relatively uniform, give it to us in advance so we understand what the scope of this is, we can go research the questions, and it doesn't preclude you from going off script, it just gives us the roadmap so that we can prepare our witnesses without trying to guess what is going to be covered.

THE COURT: And they could ask follow-up questions?

MR. KASS: And they could ask follow-up questions on that. Our proposed order doesn't say that they can't ask follow-up questions, it doesn't even say they can't raise

objections if we don't know the answers to those follow-up questions, but if they go way off the reservation and it is a completely unrelated area then all our proposed order says is a complaint about a witness's failure to know the answer to that would not be, quote, well taken. Okay. So that doesn't impose any real penalty, it just basically tells them give us a real good solid outline so that we can prepare, and look, if we don't know the answer to some question the proposed order that we have says we can subpoena the record after with an answer if there is something that we don't know.

So we had those provisions in our proposed order and, again, the parties struck that out, we are not sure why because it really benefits them, and the Special Master adopted the plaintiffs' proposal without any explanation. So again we think our proposal -- either one of our proposals, written questions or the outline, is perfectly sensible, and the outline proposal is actually we believe mandated by Rule 30(b)(6) itself that says not only do you have to provide a list of topics because in some senses the order does have a list of topics, it says you have to provide a particularized list of topics with particularity, and that's what they didn't do, and that's what an outline would require -- would satisfy. So we believe that the rule certainly contemplates it, may require it, but certainly is sensible and efficient for to us proceed.

So those are our objections, Your Honor.

THE COURT: Thank you. Mr. Williams?

MR. WILLIAMS: Good afternoon, Your Honor. Steve Williams for the end payors. I have just a clarification --

THE COURT: Do you want to respond one on one or do we want to get some other defendants -- some other OEMs --

MR. WILLIAMS: That was actually going to be my question to the Court is would you prefer us to take them one by one or save everything to the end? And then, secondly, what our timing issues are for today because I know we don't have unlimited time and there are a lot of people that want to speak, so I wanted to ask the Court those two questions?

THE COURT: We can take it one by one, just so you do it briefly, don't repeat everything for each one.

MR. WILLIAMS: I will do my best. Thank you.

First, I want to focus a little bit on what we are here for, which are the objections to the order providing for depositions, because the history of how we got here is relevant and bears on this a little bit but I don't think it is really the center issue for today, but what I would say does bear on it. We, the moving parties, stand by the declaration that I submitted as part of the motion to compel, any suggestion that the moving parties haven't throughout this entire process tried to move this along so that I don't

have to stand up in front of this Court and ask for class certification schedules to be adjusted is not well taken. In fact, we have done that throughout and have continued to do that since the time we saw Master Esshaki. We are working with several of these parties right now to come up with agreements.

But to focus on the arguments that were just made, and not in order of importance, and I apologize, but, for example, the suggestions that have been made about how this deposition would be done and you should provide us written questions ahead and it won't be precluding you if you don't, look at the order they submitted. The order they submitted says unless a specific question was given to the deponent counsels two weeks in advance of the deposition we can't even bring motions related to the failure to answer that question.

Now, Master Esshaki was put in a very difficult position and I would submit he was put in a very difficult position because of the history of how we got here. He didn't say that he couldn't rule on the motion because the parties, the defendants and the plaintiffs, had failed to give him the information. The reason he couldn't rule on a motion to compel was because from the time we began to meet and confer with the OEMs they have refused to provide the most basic information that any party familiar with litigation would provide in the context of discovery and new

Rule 1 and Rule 26 all recognized the duty to cooperate. The questions that Master Esshaki has said we should be permitted to ask at these depositions are simple questions about where are your documents and data, what are the costs attendant to the production of the documents of data, that's it. That's what parties normally do in meet and confer. And the one thing counsel said that I agree with is we have been at this for almost a year and most of them haven't answered those questions, that's why we are forced into a position as Master Esshaki ruled.

THE COURT: Wait a minute. Most of them haven't answered. When did they -- you are talking about these subpoenas to get the information, right?

MR. WILLIAMS: I'm talking about since the time we began by serving the subpoenas, and I note that until September of last year when they formed into this monolithic group to fight us we were making a lot of progress so we would ask are their issues about access, have some data gone to legacy systems that are not accessible, we were having those discussions so that we could say okay, fine, pre-2002 maybe that's difficult to get, we don't need to go into that, but that was cut off, and it was cut off when they formed into a group and took the position of essentially we are not going to give you anything except things that aren't particularly helpful.

When this Court denied the motions to dismiss in the wire harness case, the end payor case, it recognized the truism that in an indirect purchaser case the plaintiffs have to show the initial passthrough at the first level and the pass on of the overcharge -- I apologize, the initial overcharge at the first level and the pass on of that down the chain of distribution, and we came to the Court in a way that was designed, and I was standing at this podium saying this to Your Honor, to minimize the burden on non-parties because we know because of the length of the conspiracies at issue in this case and the nature of the market it is going to be burdensome, we want to make it easier. We made that effort to do so.

And, in fact, we talked about the subpoena, we have cut -- of the original 37 requests in that subpoena before we got to see Master Esshaki we cut it down to just 14 through meet and confer. We narrowed it that much to make this easier. So we on our side have done everything we can to mitigate this burden and our view on the defense side is that these parties who are routinely in the federal and state courts in this country engaging in discovery this is not something new or unique to them, they are involved in massive litigation and do discovery on a daily basis, are raising roadblocks and impediments that are not justified.

Now to talk about the procedural issues that were

mentioned. All of these OEMs are here because they were served with Rule 45 subpoenas. Now, a lot of times in this case we talk about the fact that there are novel issues or new issues or different issues but one issue we have never found any law for is the proposition that in this circumstance when they were brought before this Court and jurisdiction was obtained over them pursuant to duly served Rule 45 subpoenas and not one of them has objected that we didn't properly serve them, and after the lack of information in the meet-and-confer process to permit Master Esshaki to rule did he have the authority to order these depositions so he could rule on that motion? The moving parties have submitted authority to Your Honor that says he does. The OEMs have failed to submit any authority to Your Honor that says in that circumstance when they have already been brought before the Court pursuant to Rule 45 another subpoena is necessary.

THE COURT: Well, that was for documents about a deposition, the Rule 45, what about that?

MR. WILLIAMS: Understood, but from the authority we have seen and the lack of authority they presented, once the Court has jurisdiction over that party it has jurisdiction for purposes of that discovery dispute, and that discovery dispute is the resolution of the motion to compel related to the subpoena.

THE COURT: You may have jurisdiction over the discovery dispute but you can't just bypass the rules.

MR. WILLIAMS: But we don't think we did. We think we have jurisdiction over the parties pursuant to the initial subpoena, and it is the conduct of the parties who are before the Court and the Court has jurisdiction that --

THE COURT: They are not parties, though, let's remember that.

MR. WILLIAMS: Understood, I apologize. Jurisdiction over the non-parties was obtained pursuant to the Rule 45 subpoenas that were served on them, and Master Esshaki acted within the scope of both Rule 53 and the powers that rule gives him to resolve discovery disputes and the order that this Court entered which gave Master Esshaki the powers to address discovery disputes referred to him.

And in terms of the protections, the only thing counsel referred to is, well, we may have an issue about the locations and if a new subpoena was issued we can raise that. Well, we have already agreed to go to their offices so that's not an issue. There is no issue about the scope or contents that is relative to Rule 45 so in our view the jurisdictional issue is a red herring, jurisdiction was obtained when the subpoenas were duly served. And this isn't a merits deposition, this is just a deposition for Master Esshaki to have the ability to resolve a live dispute for which the

parties properly were brought within the Court's jurisdiction.

In terms of the scope of the deposition, the reason for those topics was those 56 declarations that the OEMs submitted, and the parties may disagree or dispute those declarations but we are unable to address the merits of those without having some understanding of some of the things they said, and those declarations try to get to the conclusion of we never passed through any overcharges and therefore all of this discovery is unnecessary because it won't prove what the plaintiffs intended to prove later in the case. Now, we would take issue with that, but without knowing something we can't intelligently address those points and because they had put those issues in play in their declarations we don't seek to go into details of the substance of those things but we seek enough so that we can understand where would documents that concern those topics be.

THE COURT: Okay. Is that what you are -- when you read this order, page 6, are you talking about -- I'm talking the Master's order he signed?

MR. WILLIAMS: Yes.

THE COURT: Are you then talking about simply, for instance, number one, transactional purchase data, are you just asking where is it, are you going to ask where is it, how do we get to it, what's the burden?

MR. WILLIAMS: That is our view, that the idea of this is what is the location, what is the cost of production, the identification and description of any particular challenges, and what I mean by that is sometimes over the course of a case with this duration some databases are taken offline, they are no longer live, so there are costs attendant to putting that back into a format which data can be pulled. That's what we want to know because the point of this --

THE COURT: This doesn't say that, that's why -- it doesn't say it.

MR. WILLIAMS: Well, I think that what that is referred to is in paragraph B which immediately follows topics 1 through 5. My reading of the order is that is what is intended to be the scope of the preceding five topics.

THE COURT: Well, it says include information on format, volume. That's a big word, include.

MR. WILLIAMS: I agree, Your Honor.

THE COURT: There must be something else, so this order at the very least needs to be modified so it is clear what it is that you are seeking. You are saying what you are seeking but I don't read it -- or it can be misread, let me put it that way.

MR. WILLIAMS: It could be misread but I believe that was intended in the parties' drafting to be the

limitation on topics 1 through 5 because that was the entire purpose of this was to prevent Master Esshaki to do the analysis of the claims burden of production proportionate to the needs of the parties in the case, and that's what this was about.

I would like to address briefly, if I can, this issue of written questions. We put in a fair amount of authority of courts explaining why written questions are a disfavored form of getting information. I believe in this instance that's heightened because of the fact that the questions we now seek to ask are really the questions that should have been answered during the meet and confer almost a year ago, and now we face a schedule whereby if we were to get together and serve written questions and 30 days go by and we get written responses and then we identify issues or lack of answers or things that we think are missing, we engage in a meet and confer, we would be back seeing Master Esshaki in November filing motions to compel about those. There comes a point at which putting a witness on the stand and having the ability to ask him questions is the best, most efficient way to get answers to those questions.

THE COURT: But doesn't it seem here that this is so large where these things are, things might be depending upon what you ask in so many different locations, so many different people involved, doesn't it seem like a witness who

is going to be orally deposed would be better prepared by at least knowing -- you know, I like maybe the outline idea that they at least know where you are going so they can be prepared for that?

MR. WILLIAMS: And, Your Honor, we don't have any objections to the non-mandatory and non-binding. We will give you outlines or descriptions of things we want to ask. Frankly, Your Honor I don't think there is any lack of knowledge on their side of what it is. They have had the subpoena, we have had many meet and confer sessions, we have had letters back and forth, we have those two giant binders, double-sided copies of briefing, we have had full days with Master Esshaki on this, I find it very hard to believe that there is really a lack of understanding what it is we are seeking here. So if it is not binding, if it is not as they had proposed, if the specific question is not given we have no remedy for a failure to ask it, that's not an issue because we don't want to spend this time doing this, and we are working very cooperatively with the defendants but we should be deposing their witnesses and they should be deposing ours.

THE COURT: How many depositions are we talking about? I remember last night doing the calculation and I can't remember what it was.

MR. WILLIAMS: Your Honor --

THE COURT: There may be two for some.

MR. WILLIAMS: There may be two if they are in the truck and equipment dealer case, and they are not, and then there is also the issue of the group that comes behind that the Master carved out because they are referred to as smaller but, you know, without having the numbers offhand I think we are talking about something like nine in the beginning group, and somebody may correct me on that but that seems about right to me.

THE COURT: Okay.

MR. WILLIAMS: The point of it really is to me this is unprecedented in an indirect purchaser case as the Court's motion to dismiss order recognized, OEMs, contract manufacturers, they always provide discovery, and companies like Apple and Hewlett-Packard and Dell, they think their information is very confidential and private, they don't like the burdens and disruptions of non-party discovery, but they produce it. It has not even ever come to this point where we have had to move to compel to have it produced, there is nothing different about these parties here.

And also the citation to Rule 53 is a bit misleading in that that's permissive on the Court, that's not mandatory, that's not a shall, that's in the appropriate circumstances. So if we step back and look at this case, and we worked on our briefs together with the defendants so it

says things like alleged conspiracy, but given the guilty pleas that have come in this courtroom it is not an alleged conspiracy, it is a real conspiracy that happened, it took place over a roughly 15-year period, it affected auto purchasers throughout this country. There's no doubt about any of those things. We are using the discovery process to get information that the law says we are entitled to, and all we have had from the OEMs is a brick wall stopping us, whereas they have pursued their claims with the defendants but they want to stop the plaintiffs from being able to pursue our claims against the defendants. If this had come up, Your Honor, last November it would look very different but we are now in almost July and we have now adjusted the schedule two times because of this issue only.

What Master Esshaki did, and in my view he did it in a very even-mannered way. I might in my advocate's position had said the reason for this is there has been obstruction, but he did it in an even-manner way to get to the end result of what is it I will order produced, if anything. The depositions are only an interim step to get to that point. So we are again faced with the situation where our time is so constricted and no legitimate basis has been identified by the OEMs to say either the meager offer we made to you last September should be accepted or we should just keep delaying this, we should issue new subpoenas, we should

issue written questions, it is time to bring this part of this proceeding to its conclusion and the only way to get there I would submit respectfully is what Master Esshaki ordered, there is no abuse of discretion in it, it is frankly much less burdensome than what he might have done, which would have been to say I'm ordering production, it is something that's really intended to help in a practical way.

THE COURT: Okay. Thank you.

MR. WILLIAMS: Thank you.

THE COURT: Do you want to reply?

MR. KASS: Yes, Your Honor. Just a couple points.

THE COURT: Wait a minute.

MR. HEMLOCK: I was going to speak on behalf of the defendants but I don't know whether you want to hear from the OEMs first, I have some follow-up to what Mr. Williams said.

THE COURT: No, let's hear from you and then he can respond to both of you.

MR. HEMLOCK: Thank you, Your Honor. Adam Hemlock, Weil, Gotshal & Manges, on behalf of the Bridgestone and Calsonic defendants, and speaking for the defendants jointly.

Let me just echo very briefly a couple points Mr. Williams said. We are on a tight schedule and Your Honor has indicated repeatedly that we need to keep things moving forward. And so in thinking about what to do here we have to be mindful of the fact that there are going to be several

steps subsequently, it is not just resolving this dispute but thinking about how it is going to work down the road. So we have been at this now for a year and-a-half -- I should say a year, it has been a long process, we have not made meaningful progress. These depositions, in terms of burden it is minimal, it is 14 hours, it is just a little, but what they represent, what they reflect, what they are intending to do is have a meaningful impact on what the burden is going to be once we get to the documents.

I can assure you that the serving parties are very interested in ensuring that we do not unduly burden the OEMs. We have a set of things we want, as Mr. Williams pointed out, it started off as a big subpoena because that's the way it goes in these cases, you start big and then you sit down and negotiate and figure out what the burdens are and what is really important. We haven't had an opportunity to do that because in our view the OEMs have not provided us sufficient information to have that meaningful dialogue. So Master Esshaki noted that, that's the basis for him having ordered the depositions.

We are eager to have those depositions because once we have those then we can sit down with the OEMs or Special Master Esshaki can sit down and evaluate our motion to compel and he will do it in an educated and informed manner because what we really care about here is getting to the documents,

figuring out what we need, what we truly need, not everything under the sun, what's reasonable, what's reasonable also in light of the costs and burdens associated with the OEMs, which we don't want to overdo, and then move forward with litigating the case because we do need those documents and so on.

I would also point out that much of the discovery that we are trying to figure out whether it exists, where it exists is hugely relevant to this case. Your Honor pointed out at the last hearing the relevance of the declarations that were provided by the OEMs and the fact that they say that changes in parts prices would not have an impact on car prices. As I believe you realized at that point, that's a meaningful issue and it covers all of the cases, not just the lead three. So isn't it important for us to really make sure we get this right?

You asked the question about whether depositions upon written questions are appropriate here. Speaking for the defendants we think that would not be a good idea because we only have one chance to do this and our concern would be that they come back, and even if they behave in good faith they come back with responses that necessarily and reasonably lead to follow-up questions. They, by their own admission, the OEMs in their declarations have pointed out these systems are very complicated, there is going to be lots of back and

forth of databases and tapes and so on and so forth, and I think even if they in their best effort in good faith tried to provide the information required we would have reasonable follow-up questions. Why not just do it in a deposition? There is no real additional burden. Either way they still have to prepare their witnesses, and they still have to sit down for a deposition, we still need to get a court reporter and so on, but Mr. Kass pointed out that he has never done a Rule 31 deposition, I have never done one either and there is probably a good reason for that, it is because it is not the most efficient way to get the information we need.

One other point and then I want to talk about a couple of other things, but on the issue of the subject matter of depositions, we agree with Mr. Kass, we are not looking to do a far-ranging deposition on how these companies conduct their business, how they price their cars and how they purchase parts and so on, but we just have to be a little bit cautious, Your Honor, because there is going to be a need for just a little bit of questioning on how they conduct their business so that we can understand what documents and data are generated and transferred between different entities and so on. So I don't think it would be unreasonable if we were taking a deposition in front of the OEMs to just ask a few questions, a few minutes, we just need a little bit to understand how do you price your cars or how

do you purchase your parts because we need that for context to reasonably understand what documents and data exist and what we need and what we don't need and what we might be able to do away with.

THE COURT: If you ask them how they price their cars though, I understand you need some context but you are getting to the heart of what --

MR. HEMLOCK: It is true.

THE COURT: -- this is.

MR. HEMLOCK: It is true, and it is tricky, Your Honor, I will concede that, and I will also concede I don't know how I would articulate drawing that line. But, again, I come back to the point that if we don't get this right at this round we are going to be delayed again and I think Your Honor wants this case to move forward. I would just be afraid we sit down and some of the questions bleed a little bit beyond just where something is and say, well how do you do what you do, and then the OEMs would say the Court said you can't ask about that and then we are going to be a little stuck.

Let me briefly address another issue that was raised in the OEMs' briefing regarding the distributor and non-core entities. One of the issues that the OEMs have objected to is whether some of those entities need to be within the framework of this 30(b)(6) deposition that this

Special Master ordered, and we think the answer is absolutely yes, again, because we only have one bite at the apple here.

We don't know how the OEMs are structured, it could be the case for one OEM that they have a single entity that buys the parts, prices the cars and sells the cars, does everything, and if that entity is subject to the subpoena then that's great and in the 30(b)(6) deposition we will learn all about what they have and we will be happy. The problem is we get the sense that in some cases some of these non-core entities might have documents and data that are within the scope of the documents we are seeking in the discovery and are going to be highly relevant to the case, but if those entities are not within the scope of the witness's preparation for the 30(b)(6) we won't learn what they have.

What I'm afraid of is if they are out and let's say we sit down with an OEM, I depose an OEM, and I say okay, well, where is your information regarding the pricing of cars? And they say, well, the entity that I checked has a little bit of it but they mentioned that so and so non-core entity is really where most of that resides. And I said okay, tell me about that, and he says well, I didn't check because they were non-core and the Court didn't order me to go check with them.

We really think of this as nine OEM families within

the United States, we are not asking them to go abroad because we understand the implications there, but within the U S., within those OEM families we need to understand where the documents and data reside again so that either Master Esshaki or you can work with us to order the appropriate scope of discovery.

One other point I would note, Your Honor, and probably we will get to this, is Hyundai and Kia. They have suggested that they are smaller OEMs and therefore should not be subject to the scope of this. I would just say briefly throughout the end of the meet-and-confer process and through the motion to compel they did not take that position. The draft order that they provided to the other side with respect to the 30(b)(6) depositions did not define themselves to include Hyundai and Kia, they are a meaningful player in the market, they currently together account for --

THE COURT: They haven't given their objections yet.

MR. HEMLOCK: That's correct, I didn't know what you wanted me to do when but if --

THE COURT: I don't want you to have to argue in response and then I get you twice.

MR. HEMLOCK: Fair enough.

THE COURT: Once is all you get.

MR. HEMLOCK: So do you want me to sit down?

THE COURT: Yes, you can sit down assuming you are done with the main argument.

MR. HEMLOCK: Yes.

MR. KASS: Thank you, Your Honor. Just a couple of points.

First, with respect to the outline issue Mr. Williams started to quote our proposed order but then on the key provision he started to paraphrase and it is not what we said. What we said was unless a specific question was provided to the deponent's SSE counsel two weeks in advance of the deposition, motion practice against any deponent unable to answer a given question or set of questions will not be well taken. To the extent a witness does not know or is unable to recall certain information during a deposition, the deponent SSE group may supplement its response at a later time and in an appropriate manner. It doesn't preclude them from filing a motion if we have gone off -- if we have not answered or were not adequately prepared. It basically tells them, look, give us a detailed set of -- a detailed outline, let us prepare, we have two weeks to do it, it doesn't impose any extra delay, it is a reasonable method pass forward for us to be able to prepare and respond to the depositions to the questions.

On the other issue, on the other practical issue on the limitation, it says -- what we proposed was for avoidance

of doubt no party may ask any SSE substantive questions about the auto parts cases, for example, and by way of illustration but not limitation the party may not ask questions about price fixing, overcharges, passthrough, damages, internal investigations or external discussions relating to those cases. So it says location, availability and burden, that's what you are allowed to ask about.

And so that was our proposal and we think that that makes eminent sense. It limits the deposition, makes it defined, gives us time to prepare and allows us to answer the questions.

The other thing I want to respond to was sort of the concept that the SSEs might have somehow been delaying this process. If you go back to our original opposition in response to the motion to compel we included all the correspondence. We explained our leadoff ground was that the parties have failed to negotiate in good faith, and we made an unbelievably powerful presentation on that point. The parties were taking a months to get back to us from a letter or weeks to get back to us in response to our proposal. They say they cut back the subpoena from 30 something requests down to 14, all they did was eliminate the duplicative requests that asked for exactly the same information, they didn't narrow the scope of the subpoena at all. Okay.

So when you are talking about did they negotiate in

good faith, our position is they didn't and we have the backup to prove it, okay, all you have to do is read our opposition and the exhibits where we quoted from this. So we don't agree we have been -- we don't agree that we have been delaying the process, if anything it is the other way around. What we asked for, and this is our position under Rule 45, was what information do you really need that you don't already have because you have an unbelievable amount of information, tell us, and we will tell you -- we will try to come up with ways that we can fulfill those gaps, and when we weren't getting any proposal we offered a proposal and in response rather than say, well, this isn't sufficient or that's not sufficient, how about this, they said no, we are declaring impasse and we are going to file our motion. That's where we are today.

And Special Master Esshaki did not say that the reason he's ordering depositions is because the SSEs didn't provide information that they should have provided. He noted that he didn't have enough information on these issues and so he asked for depositions on it. He didn't say that we didn't -- we provided 56 declarations that went into detail about the burdens associated with this deposition and our -- how the information is kept, and the concept that they have in their minds and in some of the letters that there is some magical database out there that somehow connects a wire

harness to the end-user price on a vehicle by vehicle basis, that doesn't exist, and the burden of trying to recreate it is impossible, and our declarations explained why that is.

Now, at the mediation the Special Master said I would like some more information about that, and then he ordered the depositions to clarify.

THE COURT: So he determined that these declarations were insufficient for him?

MR. KASS: He did not determine that the declarations were insufficient, what he said was he didn't have enough information generally to rule but he didn't say the declarations were insufficient. That may be an implication of what he ruled but he didn't actually say that.

THE COURT: Okay. All right. Who wants to go next?

MR. ASHBY: Joseph Ashby of Quinn Emanual. I represent Hyundai Motor America and Hyundai AutoEver, but arguing on behalf of the domestic distributors and non-core subpoenaed entities.

THE COURT: Okay.

MR. ASHBY: Your Honor, I would first like to clarify what the definition of what those two groups are because in some of the ways that the parties have referred to them it creates confusion as to who was included in those groups.

THE COURT: Just one minute. Is this microphone on? It is very quiet. Try it again.

MR. ASHBY: Are you able to hear me now?

THE COURT: Yes, that's better.

MR. ASHBY: Thank you. The domestic distributors are entities in the United States that distribute cars predominately manufactured by foreign automakers. The domestic distributors are not part of the major U.S. OEMs. In fact, the domestic distributors are not OEMs themselves, they do not have any manufacturing capacity, they don't buy parts, they don't design cars, they distribute and sell cars. The non-core entities are not part of the automotive supply chain. They are within, to use a term used in the briefing, the corporate families of OEMs but they themselves do not manufacture cars, they don't design cars, they don't sell cars to consumers, they don't distribute cars. They have other roles such as research and development, regulatory -- interacting with regulatory entities in the United States, providing capital finance support for an OEM and other similar functions, but they themselves are not part of the automotive supply chain, they are not part of the entity determining what the price of a car is, they are not part of that process of getting a car from the factory floor to a consumer.

With that background, at the March 24th hearing the

Special Master ruled at pages 42 to 43 and 46 of the transcript unequivocally that the domestic distributors and the non-core subpoenaed entities were to be excluded or carved out from these depositions. However, the order does not include that carve-out. The parties have explained that based on an exchange that occurs on page 47 that makes no reference to the domestic distributors or the non-core subpoenaed entities. Throughout the hearing when he made -- when the Special Master made those two rulings and then also earlier in the hearing the Special Master had specifically used those two terms, domestic distributors and non-core subpoenaed entities, but then later there is an exchange where counsel for one of the parties asked a question about how the depositions would apply to an OEM making no reference to domestic distributors, making no reference to non-core subpoenaed entities, and the parties used that exchange as a basis to say that the order should not include the express carve-out.

The domestic distributors and non-core subpoenaed entities submit that the order should be conformed to the Special Master's ruling at the March 24th hearing which reached the correct conclusion that under proportionality analysis they are not appropriately subject to the depositions. The domestic distributors are not appropriately subject to the depositions because they are only a small part

of their corporate families. The parties in their briefing make the point that they need the domestic distributors so that they would be able to have a complete corporate picture, but as counsel for defendants acknowledge, the parties have not served the foreign entities.

So for the entities such as that one that I represent, Hyundai Motor America, its parent entity that manufactures the majority of the cars it distributes is a South Korea corporation, Honda Motor Company, that has not been subpoenaed. So no matter how many questions they ask of Honda entities they won't be able to get to that information because the parties made a decision not to subpoena those foreign companies, and so subjecting the domestic distributors to the burden of a deposition when their declarations have already explained that that information in terms of the parts, the manufacturing of cars, procuring of parts reside with the foreign entities is disproportionate to the amount of information they can get from them.

The domestic distributor declarations also explain that it is disproportionate because they don't have information about the final retail sales, they would at most have information about who purchased the vehicle and maybe their address, telephone number and e-mail address, but they won't have information about the final purchase price of the car or any of the other details of that transaction, all they

will have is the VIN and who ultimately purchased it. So for the domestic distributors it imposes a disproportionate burden to require them to submit and prepare for a deposition when they have already provided declarations explaining their limited function.

Turning to the non-core entities, they are similarly disproportionate because the parties have not explained why they are pursuing entities that have such a limited role. The non-core entities have submitted declarations that explain that they have very limited functions. For example, Honda Auto Ever is a consolidated IT department, one of the non-core entities. Subaru Leasing is an entity that provides leasing to Subaru employees. Fuji USA is an entity that interacts -- that does some emission testings and interacts with regulatory entities. Hachi, H-A-T-C-I, is an entity on behalf of Hyundai and Kia that interacts -- that does emission testing and interacts with regulatory agencies.

THE COURT: Did you discuss this with the Master?

MR. ASHBY: I was not permitted to make argument at the hearing and the domestic distributors and the non-core entities were excluded from the mediation. The mediation occurred in the morning, the Special Master limited it to the OEMs, and then at the hearing the domestic distributors were presented to present argument, and when I stood to present

argument on behalf of the non-cores the Special Master told me that he already reached his conclusion and did not want to hear argument on behalf of the non-cores.

THE COURT: But he carved you out but not in the order, is that --

MR. ASHBY: That's correct, the domestic distributors and the non-cores were carved out at the hearing, twice he made an express statement, but then the order that was entered does not carve out the domestic distributors and the non-cores.

So each of the non-core entities, although they may have some small sliver of information subjecting them to a deposition on the potential that somebody -- that they might have something that the partes are not able to obtain from another source imposes a disproportionate burden. Counsel for the parties suggested that they're concerned about the possibility that one of the other entities would be deposed and would sort of point to them, but in the parties' briefing they haven't identified the specific circumstance where they have that concern, and the burden would be proportionate, so --

THE COURT: If the concern came up they could then do something else, right? If through the other depositions they find they need information from you and they can articulate the information they need from you that could be

cured?

MR. ASHBY: Certainly, Your Honor, and as I had understood the carve-out from the Special Master is that the part of the process was that the -- these groups were carved out so the parties can gain a better understanding of the OEMs and once they had that better understanding if there is a need to revisit some group later, revisit an entity later, they would not be precluded from doing that. So if they were to take a deposition and there was somebody that would testify there is a non-core entity, there is nothing in the order or nothing in the request by the non-cores that would preclude some follow-up occurring at that later stage.

And one other point, although the non-core entities are part of corporate families that are OEMs and regularly engaged or have some frequency in litigation, they are smaller entities within those families and many of them seldom, if ever, have cause to be in litigation, so for them the burden of preparing someone for a deposition, even if it is just a few hours, their in-house process isn't built around the idea of regularly being in litigation so it is fundamentally disruptive to them in a way that is disproportionate to the prospect that they may have some small sliver of relevant information.

Thank you, Your Honor.

THE COURT: Thank you.

MR. SURPRENANT: Good afternoon, Your Honor. Dominic Surprenant, Quinn Emanuel, and I'm speaking on behalf of the 17 Daimler entities, each of whom have been ordered to produce Rule 30(b)(6) designees on five broad but importantly non-overlapping topics.

Now, seven of those entities, Your Honor, are Daimler Truck entities, they filed their separate objections, which presumably I will argue later. I want to talk about the ten Daimler entities that are non-truck, that are automotive domestic distributors and non-core entities. There's ten of them.

Now, in the normal course, Your Honor, if I represented one entity and I looked at the Special Master's order and I looked at the five broad topics that don't overlap I would say well, I think likely the best way to present the 30(b)(6) designees is to find the employer, employee or officer that knows the most about topic number one and knows the most -- a separate person about topics two through five. So in the normal course I would anticipate if I represented one entity presenting five designees because that would be the most efficient way to do it. And the fact that the issuing parties departed dramatically from what the Special Master said in this courtroom, and I have ten entities, doesn't change that analysis. I have entities in Oregon, in California, in Alabama, in Atlanta, in New Jersey

and in Michigan, and after -- if the order is not modified as to my ten Daimler entities, after I complete the process of traveling around the country and interviewing dozens of people I may well present 50 designees.

I told the issuing party my concern at the beginning of the month. I said, hey, guys, I have 50 potential designees, that does not make any sense. In 14 hours that's 840 minutes, divided in two, plaintiff and defendant, that's 420. If I have 50 designees you are going to have 8 minutes and 24 seconds per witness. Maybe the plaintiff will be able to do the admonitions, the background and the preparation and may even get a question or two in, and that simply, Your Honor, cannot be proportionate for a non-party.

Your Honor, I don't know if the number would be 50, it may be less but it is not going to be 5, it is not going to be 10, it is not going to be 20, these are distinct entities and distinct topics. And so I think, Your Honor, that the issue -- that the Special Master's order as to my ten Daimler automotive entities is -- I hate to use the adverb wildly disproportionate and it should be stricken.

But at the same time, Your Honor, understand the incredible burden this multi-district litigation has imposed on Your Honor, Your Honor's staff and the Special Master. And so I would propose in the interest in moving things ahead

a compromise as to my ten Daimler entities, and that is first of all, Your Honor, while I disagreed with what most of Mr. Williams and Mr. Hemlock said, I do agree, as Mr. Williams said, it is not a merits deposition, it is not important that you catch some particular phrase that is useful in a litigation that would be useful at trial. This is information about what documents and data we have, it should proceed by written questions and written answers. And what I would propose, Your Honor, for the ten Daimler entities is the issuing parties can pick two, I would strongly recommend it be Mercedes-Benz USA, a domestic distributor and Mercedes-Benz USI, it is in Tuscaloosa, Alabama, it is a very small outfit.

The notion that these are gigantic companies that can push a button and give answers is false. Mercedes-Benz USI puts together certain vehicles with parts that are bought by other entities, and I think those two as a compromise, Mercedes-Benz USA, Mercedes-Benz USI, ought to answer 20 written questions from the five topics. The issuing parties and myself can meet and confer, we can decide what those questions would be, if there is some limited disagreement we can officially put it to the Special Master. I think the answers -- the questions should be written, the answers should be written. This is simply not a topic where oral depositions make any sense.

Now, Mr. Hemlock raised a concern maybe they won't get an answer. Well, you can ask follow-up written questions just as you can ask follow-up questions at a deposition but, Your Honor, it will take hundreds of thousands of dollars for me to visit with the ten Daimler entities all over the country and figure out who the appropriate designee is, prepare them to memorize information so they can then give it at an oral deposition, that is is not proportionate, I think my compromise position is much more efficient and will provide the defendants with the information -- the issuing parties with the information they need.

One important proviso, Your Honor, is these companies, there are 17 of them in automotive, they are for the most part quite small, this would be a very costly burden, and what I would propose is there be cost shifting decided in advance by a percentage, a ceiling and a floor. The floor would be 60 percent in my proposal, the ceiling would be 90, but I think there is an important --

THE COURT: 60 percent of what?

MR. SURPRENANT: Of the attorney fees and costs that the Daimler entities incur in preparing the discovery. This is a Rule 45 non-party, there is abundant authority cited --

THE COURT: Wait a minute. Are you asking that they pay 60 percent to 90 percent?

MR. SURPRENANT: Yes, Your Honor. And there is abundant authority cited to the Special Master that --

THE COURT: Why shouldn't they pay it all?

MR. SURPRENANT: I was trying to be -- I was trying to be conservative, Your Honor.

THE COURT: Well, I mean, that's usual.

MR. SURPRENANT: Well then I would propose that, Your Honor, but I'm not that dumb. But serious, Your Honor, just to end, is this makes no sense. We were told by Mr. Williams that there would be nine depositions, we were told by Mr. Hemlock that they -- that they wanted to impose minimal burden, that's simply not true. I asked them -- I said, look, guys, we are going to have 50 automotive designees, maybe it won't be 50, maybe it will be 40, would you please give me a draft declaration that I can take to my clients what they would have to swear to be excused from one or more topics so we don't have 50 designees, and I was met with silence, I have never been given such a draft declaration.

So, Your Honor, to conclude --

THE COURT: So you're saying there is not the nine that he's saying, there is at least --

MR. SURPRENANT: From my --

THE COURT: -- 40 to 50 on your one part?

MR. SURPRENANT: Yes, and it is going to be eight

minutes. What meaningful information can the plaintiffs get in an 8-minute, 24-second deposition? Of course they can't. We can have written questions, written answers, we will meet and confer, I'm sure we can come to 80, 90 percent agreement, efficiently put it to the Special Master, have 20 questions and 20 answers with availability of limited follow-up on things they don't think are as complete as they should be.

THE COURT: Where does the number 20 come from?

MR. SURPRENANT: It seems to me it is a reasonable number, Your Honor, there are five topics. And these again are not merits issues, it is where's your documents, where's your data, how much will it cost. There is no reason to pour all of that data and information into a witness so he can regurgitate it on the record, that doesn't advance anything. Maybe the number is 25, I mean, nothing in this proposal is set in concrete, but what is set in concrete is as to the ten Daimler entities this order is wildly disproportionate. It departs dramatically from what the Special Master indicated and it results in something that simply makes no sense, and so I would suggest, Your Honor, you simply strike the ten Daimler automotive entities or in the alternative some fashion of the compromise that I have suggested.

THE COURT: Okay.

MR. SURPRENANT: Thank you, Your Honor.

THE COURT: Thank you.

MR. WILLIAMS: Your Honor --

THE COURT: Response?

MR. WILLIAMS: -- I just want to very briefly respond at this point to some of the things just said, in particular --

THE COURT: Were you prepared to take so many depositions on this?

MR. WILLIAMS: Well, it seems to me that there is a lot of advocacy going on here. There is nine 30(b)(6)--

THE COURT: You're in a courtroom so don't worry about it.

MR. WILLIAMS: Understood, and there is no jury. So there are nine 30(b)(6) depositions, you can give me one witness, you can give me two, you can give me five, that's in your control, it is not going to be 50. He doesn't have to fly around the country, he can prepare the witnesses -- since the topics apparently are as simple as counsel just represented I don't see why anyone is flying around the country to multiple locations to sit down and interview people about it, but that's not the most important point because we talked about cost shifting and when this process started we were open to it, we told them we are open to considering it, let's have a discussion, a good-faith meet and confer so we can understand it, but what strikes me inappropriate about them raising this topic now is they --

I'm sorry, Mr. Kass, counsel said we put in a brief and it is an incredible showing. I'm not going to get up here and tell you that we wrote the greatest brief, I will say it is in the record, and the Master had it. So the record of who tried to meet and confer is set forth in the documents before the Court, but my point is at this point at least the end payors we object to cost shifting on this because --

THE COURT: Why?

MR. WILLIAMS: Because the 20 questions that Counsel just said we will give you answers to those are questions that parties answer and non-parties answer when they meet and confer to avoid having to bring discovery motions. We never should have had to gotten to this point if they had answered those questions nine months ago when we asked them to answer those questions.

THE COURT: Well, you talk about money and the costs of this, the parties seeking the information, I mean, maybe this discovery on discovery is a little different but ultimately you are going to get into this production and you are going to be paying, you, not you personally, but you, the seeking parties, are going to be paying, they are the -- they are the non-parties, why should they pay to give you that information?

MR. WILLIAMS: Well, I want to break it down, Your Honor. There are two points, there is the cost of

production, which in some circumstances may be shifted, and when there is a record before the Court about that the Court may decide that cost shifting is appropriate and may determine as between the moving parties as to when that cost shifting is appropriate, but what we are talking about now is something different. What we are talking about now is what we contend is the information they had a duty to provide during the meet-and-confer process so we could have avoided the delay and avoided the motion to compel, and they are saying we should pay them just for that, just for the information about is there some impediment to producing it, where is it located, what form is it in?

THE COURT: I'm not talking about that. I'm talking about what about when you attend a deposition, and there's hourly costs for attending a deposition I assume?

MR. WILLIAMS: Yes.

THE COURT: Why should you not pay for that?

MR. WILLIAMS: Because the questions that we are going to go to these depositions to answer are questions that should have been answered during the meet-and-confer process before the motion was filed.

THE COURT: I don't agree, I think you are going to end up paying for it so you should keep that in mind.

MR. WILLIAMS: Thank you, Your Honor.

MR. SURPRENANT: May I respond briefly, Your Honor?

THE COURT: Yes.

MR. SURPRENANT: Mr. Williams just told you essentially that I made up the fact that there are going to be 50 designees or some large number, it is not true. With respect to the truck entities where I have done the most work I can tell you there are seven truck entities, I would probably have 30 designees, not 35, but 25 to 30, these are different topics. The people -- if Your Honor thinks about it, automotive industry there is procurement, what you pay, what you buy and what you pay, there's costing throughout the process and there is pricing. Those are different topics, the same people won't know the answer. So there is a very real likelihood as to my ten automotive clients that we are talking some large -- I hate to be hyperbolic and I'm not -- ridiculous amount of designees, it is non-proportionate.

Now, Mr. Williams just told you --

THE COURT: Well, that would be their problem so you just supply the people and they will have to deal with the depositions, right?

MR. SURPRENANT: Well, if they want to take 8-minute, 24-second depositions I think it is disproportionate, Your Honor, and I don't think my clients -- they can't pay for the disruption. They could pay for my fees, they could pay for the cost, they can't pay for the disruption that these depositions will impose on non-parties,

they can't pay for that.

Mr. Williams said well, they shouldn't have to pay because, citing no authority, this is information that should have been provided in the meet and confer, and in a very general, very superficial level I agree with that in the normal course. In the normal course if I had a Rule 45 subpoena I would say hey, folks, this is going to be trouble, difficult, here is my issues, but this subpoena was so broad they didn't cut it down at all. There is a very good section I can say because my firm wrote it, Mr. Kass's brief about how the so-called reduction was simply removing duplicates. They didn't narrow the subpoena at all in a meaningful substantive way. And so the very effort, the very effort to do what we are now doing, where is the data, where are the documents, how much will it cost, would itself have been a very substantial burden. And so, Your Honor, if they are ordered to pay 100 percent of my fees and costs I think that would be helpful, that's not going to solve the disruption.

The reason there are so many entities, ten plus seven truck entities, is because they are relatively small entities with a specialized focus, and it will be hugely disruptive to order them to appear for oral depositions. So I would urgently suggest to Your Honor that my proposal of written answers, written questions to two of the ten Daimler entities, the ones that are most relevant, MB USA and MB USI,

ought to be modified, and unless Your Honor has any questions that's all I have.

THE COURT: Thank you.

MR. HEMLOCK: May I have 60 seconds?

THE COURT: Yes.

MR. HEMLOCK: Very briefly, Your Honor. First of all, with respect to the domestic distributors, counsel for the domestic distributors said it all, they buy and sell cars.

THE COURT: Keep your voice up.

MR. HEMLOCK: They buy and sell cars, that's what this case is about. The ADPs and EPPs are claiming that they bought cars that cost more than they would otherwise because of the defendants' conduct, so the domestic distributors are selling those cars, and they point out it is -- they are selling cars that came from abroad, all the more reason that we need discovery possibly from those entities because those other entities are abroad and because of procedural -- certain procedural difficulties it is difficult for us to get discovery from them. We are at least entitled to a deposition just to find out what they have and then we can figure out the burdens from there.

On the non-core entities they point out they are not part of the supply chain but that's not standard. The standard, Your Honor, is whether they have relevant

information. Now, their rolling supply chain may ultimately be relevant to whether you order certain discovery or not certain discovery to be produced but, again, on a deposition where we are just trying to find out who has what, how could they not at least tell us what they have?

The third point that I would make is to some extent the burden issues here are scaling. They make a point that many of these entities don't have anything, there is no burden, they just have to give us a declaration or some statement that says we have nothing. Whoever the 30(b)(6) witnesses that would prepare for that OEM family would have almost no work to do with many of those entities.

Now, Mr. Surprenant mentioned the many entities in the Mercedes-Benz case. We have not had this come up with any of the other OEMs, it is not clear to me why it is such a problem with his, it may be because Mercedes-Benz is organized differently but I have to think despite there being so many legal entities at issue that ultimately the same functions are being performed and I can't imagine there are exponentially more documents and data being created by Mercedes vis-a-vis any of the other OEMs because they are structured that way from a cooperate standpoint. So I have to think that if it is going to work for all the other OEMs, and we have already been talking to some OEMs about how many depositions, no one else said you are only going to get nine

minutes per witness, and I have to think there is a little bit of exaggeration there, that we could work it out, I would be surprised if we couldn't.

Finally on the cost shifting, Your Honor, I would just like to repeat what Mr. Williams said, we are here today because we did give this the old college try for a year. I can tell Your Honor on our side we have spent a lot of money litigating this issue with the OEMs, it is not just the burden that they have had. Thank you very much.

THE COURT: Mr. Ashby?

MR. ASHBY: I want to briefly respond to those points. First off, for the domestic distributors, what is missing for the domestic distributors is that they buy cars but they don't build them so in terms of trying to figure out the passthrough of the cost of the end consumer they don't have that information because they don't know how much the cars cost to build, they don't have that information, they don't have access to that information, and they -- the entities put in declarations substantiating that point, that they simply are not privy to that. So they can -- the parties will be able to get information about what the information going to the dealers which the dealers should already have and the parties could obtain from the dealers, but the domestic distributors won't be able to give them any of the upstream information so even if the parties get

everything the domestic distributors have and impose a tremendous burden on them in getting it, they won't be able to pair that information with the upstream information so all they will know is one little middle piece and they won't be able to figure out how much the car cost to build on the manufacturing side, and so that makes the domestic distributors fundamentally different from other entities where they are not to be able to get a complete picture because the parties made a decision not to pursue the foreign OEMs, and so the parties simply won't be able to get that information. If it was critical for them to pursue these entities one would expect they would have made a different choice in terms of the foreign OEMs.

In terms of the burden on the non-core entities, the question isn't that they have nothing, the issue here is that this subpoena is so broad that by virtue of the fact that they are affiliated with companies that manufacture cars, they may have some documents. The question isn't do you have something, it is whether to get that one little piece it is proportionate to subject you to a deposition, so for the non-core entities, many of whom are very small, they have to sort of run down and figure out where in this extremely expansive subpoena they might have a couple little pieces and then prepare someone for a deposition to explain those couple little pieces, but the parties haven't explained

why they would be pursuing those tiny little pieces from the non-cores as opposed to some other source, which also goes to the related point for the -- tied back to the domestic distributors where if they don't have a complete picture the parties won't be able to engage in the type of passthrough analysis that this discovery is intended to serve, so there may be some little piece they pull from one of the non-cores but if they are not able to pair that with the rest of the information from the corporate family because for many of the non-cores they are in foreign OEM families and so the entity with the largest information won't be responding to the subpoena because they weren't served, then the non-core entities are being subjected to a significant burden to prepare for deposition, little slivers of information that is disproportionate to what the parties could potentially gain from learning about that information. Thank you.

THE COURT: Thank you. Who else wants to speak?

MR. SCHERKER: May it please the Court, Elliot Scherker on behalf of KMMG.

KMMG operates one manufacturing facility in the United States which first began production in 2009. For the period covered by the subpoena, 1992 to 2015, the vehicles sold by KMMG, and I have to be somewhat elliptical because a lot of these were filed outside of attorneys' eyes only and are under seal, the percentage of vehicles manufactured by

KMMG and sold in the United States is slightly more than the publicly filed 0.3 percent of the BMW manufacturer in the United States and by multiple magnitudes less than the rather arbitrary but apparently applicable 2.5 percent market share cap for the definition of smaller SSEs. We adopt the arguments as to the subpoena in general presented on behalf of the smaller SSE, but if the Court allows anything to go forward under the Special Master's order there is no rational basis for treating KMMG differently than the parties agreed to treat, for example, BMW with its 0.3 percent market share, BMW Manufacturing.

Now, the House declaration -- Dr. House's declaration is the linchpin for much of what has been said in terms of what is a smaller SSE and what is not a smaller SSE. And interestingly in Dr. House's declaration he treated the so-called family, if you will, entities separately and analyzed market share, for example, BMW manufacturing in the United States and the BMW distributor in the United States. The parties ultimately created these families and lumped KMMG with KMA as part of the same family, and their main argument in response is well, if you put together the numbers for KMA and KMMG you come up with a number that is north of the 2.5 percent so they are properly not carved out as a smaller SSE. Now, we object to the notion of these artificial families, these are separately owned entities. KMMG

manufactures Kia vehicles in the United States, its vehicles, its small percentage of vehicles along with a much greater share of vehicles manufactured in Korea, are sold by the separate KMA entity, which is only a distributor of vehicles.

Artificially combining these two entities in light of Dr. House's findings as to the smaller SSEs simply makes no sense. I'm referring to Dr. House's declaration, which is docket entry 123-1 and is cited in our papers. And what Dr. House ultimately concludes, this is paragraph 19, is that any documents or data at the smaller SSEs, meaning the smaller SSEs that he analyzed in the declaration, might be able to provide would not be statistically significant even assuming regression models could be constructed, being statistically insignificant the inclusion of additional data from the smaller SSEs is not expected to provide any meaningful benefit to the analysis.

The penultimate statement is it is unlikely that the inclusion or exclusion of data on small players in the market such as those with less than 2.5 percent market share individually and 8 percent in aggregate would materially affect industrywide analysis in any way. That could have been written with KMMG in mind. But as we also point out in our reply, the publicly available data on the KMA's sales in the United States belies the snapshot that the parties use in their response of the three-point something percent market

share for one particular year, and as Dr. House points out in his declaration, you don't analyze market share for these purposes to determine whether it would be useful in a regression analysis based on a snapshot, you do it over the period of time that the subpoena covers, and the data that we have attached to our reply shows that KMA's market share during that period when combined with KMMG's market share is nowhere near the historical 2.5 percent between 1992 and 2015.

Of course, Your Honor, the last thing the plaintiffs do is they try to move us into a different family. If it being in the Kia family doesn't get them across and make us a no longer smaller SSE they want to lump us with Hyundai family, and all that shows is that you can't move us around like an orphan child from family to family to try to find a place where the numbers can be jiggered to come up with something more than 2.5 percent, so we are properly considered a smaller SSE, we should be carved out under the unobjected to by the parties carve-out that the Special Master created for the smaller SSEs. To the extent that there is any revisiting of the need to get further discovery either by deposition or production from the smaller SSEs the Special Master said that would be revisited down the road after whatever takes place. With respect to the larger SSEs we belong in the carve-out. Thank you very much.

THE COURT: Thank you.

MS. KINGSLEY: Good afternoon, Your Honor. This is Meredith Kingsley from Alston & Bird, speaking right now on behalf of HMMA.

HMMA, like KMMG, is a domestic manufacturer of a foreign entity. Much like KMMG, HMMA has not been around for the entire subpoena, period which covers 1992 to 2015. HMMA only began producing vehicles in 2005, which means they have been in production for less than half of the subpoenaed period. Much like KMMG, they -- the numbers again that were filed under seal, and I don't want to represent on the record, put them very clearly within what the smaller SSEs' expert defined as a smaller SSE, and we submitted a declaration with that data that is filed under seal.

And then again like KMMG, when you combine HMMA and HMA sales data, HMA being the domestic distributor of Hyundai vehicles in the United States, both of those that are produced recently in the United States and those that are produced in Korea, when you combine those two the Hyundai family, if you will, although we all hate that term, is still under the 2.5 percent, again, the self-defining term that the smaller SSEs use.

One thing that Mr. Shirker didn't point out that I want to remind the Court is that when the Special Master defined what he called the smaller OEM group that was carved

out of the requirement of this first round of pre-discovery discovery, he defined that in reference to parties who joined in the smaller SSE brief that was filed in response to the original motion to compel. Since that time HMMA has joined that brief, notified the Special Master of that, and sought to be included as part of the smaller SSE categorization, and we repeat that here, it seemed to be ignored by the Special Master, it wasn't addressed in his order or any communications.

Finally, the parties raise in their brief that we haven't demonstrated any burden or shown that there is a burden in complying with the deposition or producing documents. Again, we have submitted declarations that explain HMMA's role, what they do and don't have, and so we would refer the Court to those to the extent that any proportionality analysis needs to be engaged in here, but submit to the Court that certainly that HMMA should be considered an entity on its own, that numbers are well below the threshold for smaller SSEs and there is no justification for not including it in that group and treating it as such for purposes of this first phase of discovery.

THE COURT: Okay.

MS. KINGSLEY: Thank you, Your Honor.

MR. WIENNER: May it please the Court, Tom Wienner on behalf of Hino Motors Manufacturing USA.

Your Honor, as the Court is aware, the Special Master did carve out -- did identify in his order a group of smaller OEMs who he ordered discovery as to them should be held in abeyance until discovery as to the other OEMs is conducted. My client, Hino, was one of the members of that smaller OEM group identified by the Special Master in his order. The parties did not object to that order by the Special Master, but in their response to the objections filed by other OEMs they did take the position in writing that it was a mistake for Hino to be included in the smaller OEM group and argued that Hino should not be carved out and discovery as to Hino held in abeyance.

I respectfully submit that the parties are mistaken on that score for two reasons. Number one, their position is procedurally defective. If they wanted to take -- if they wanted to object to the Special Master's finding that Hino belonged in the smaller OEM group then it was incumbent on them under Rule 53 to file an objection to that portion of the Special Master's order, they did not do so.

More importantly, substantively, it was certainly correct for the Special Master to determine that Hino does belong in the smaller OEM group.

Your Honor, Hino is a small medium-duty truck manufacturer that has only participated in the United States vehicle market since 2003. This very broad subpoena covers

the period from 1992 through 2015, a 23-year period. For 11 of those years, from 1992 through 2003, Heno's market share was zero because they were not part of the U.S. market. From 2003 through 2015 Hino manufactured a total of 67,908 medium-duty trucks. That is an infinitesimal percentage of the overall United States vehicle market, it was about 5/100ths of one percent. The parties have taken a position well, it is wrong to look at Hino as part of the overall vehicle market, you need to look at them as part of the medium-duty truck market, a separate market.

Well, that's fine, but this is -- their response to the OEMs' objections was literally the first time that they have ever advised me that that's the market they consider Hino to be a part of, but, fine, let's look at the medium-duty truck market. It depends on be how you define that market, Your Honor, but the generally accepted definition in the automotive industry and the truck industry is that medium-duty trucks are classes four through eight, five classes of truck, which are basically different definitions of the size of the truck involved. Hino manufactures trucks in four of those five market segments, classes four, five, six and seven.

If you look at the medium-duty truck market as classes four through eight, then Heno's 67,908 trucks from 2003 through 2015 represent 1.8 percent of the medium-duty

truck market, so by any reasonable definition Hino is, in fact, a small OEM. The Special Master was correct to treat them as such. The request by the parties now that discovery should not be held in abeyance as to Hino should be rejected by this Court. Thank you.

THE COURT: Thank you.

MR. HEMLOCK: Briefly?

THE COURT: Yes.

MR. HEMLOCK: Briefly with respect to Hyundai and Kia, we think it is not appropriate to measure the market share based on how many Hyundais or Kias are manufactured in the United States as a proportion of the number of cars sold in the United States. Throughout the meet-and-confer process and the negotiations, the question of whether an entity or an OEM family was smaller versus larger was based on how many cars were sold by that OEM family in the United States as a proportion to the total number of cars. What Hyundai and Kia are doing now is a matter of convenience. What they are focusing on is how many cars they make here but that's not relevant. The fact of the matter is there are six named plaintiffs that base their claims upon purchases of Hyundai and Kia cars and of course they represent a class of many purchasers of Hyundai and Kia cars. Together Hyundai and Kia in 2015 had 8 percent of the market.

Now, counsel pointed out that they don't think they

should be treated together but they are both part of the Hyundai conglomerate and, in fact, our understanding is that the Hyundai Santa Fe and the Kia Sorento are both manufactured at KMMG and to some extent there are parts that are put in both Hyundai and Kia cars, so we don't think they are independent, they should be looked at together, they are a meaningful number of cars on the road today that were built by them whether in the United States or abroad, claims are based on those cars, and they should be included at least in the depositions and we can figure out what to do with documents later. Thank you.

THE COURT: Thank you.

MR. WILLIAMS: Your Honor, 60 seconds on this point, please? Thank you. Steve Williams for the end payors.

I just want to comment that the market share terminology that you are hearing about is just something that some of the OEMs invented, it was not adopted by Master Esshaki as the rationale for his decision in any way, it was just terminology. And as to that point, and this is page 28 of the brief the parties submitted, but another criteria that was important was the relevance of the information, and in this case both Hyundai and Kia were identified in DOJ press releases as being specific targets of price-fixing conduct by defendants. We have claims by

purchasers of Hyundais and Kias. I would submit that was the reason that Master Esshaki included them in the deponent group rather than a determination about relative market shares. Thank you.

MR. SPERL: May it please the Court, Your Honor, Andrew Sperl for truck and equipment dealer plaintiffs. I would like to address the argument regarding Hino Manufacturing.

First of all, with respect to the waiver issue I do understand Counsel's argument on that issue. I would submit that it is appropriate for the Court to nonetheless consider the issue that was raised in the parties' brief with respect to the misclassification of Hino. I don't think anyone is arguing that this Court somehow lacks the ability to consider that as a matter of law, and because what we are talking about is really a misclassification error I think it is appropriate for the Court to consider it, it is not unduly prejudicial on Hino for the Court to consider at this time.

With respect to the substantive issue as to how Hino should be classified. First of all, counsel for Hino doesn't appear to dispute that it is appropriate to look at the medium-duty truck markets in determining this percentage although there is a disagreement as to what the percentage is. Considering the market properly as the medium-duty truck market, that means that Hino's percentage of commerce is

certainly not the 0.5 percent, that is the number that was before the Special Master when he made his decision, it is something else.

We've submitted with the parties' brief on Hino's objections or with respect to the SSE's objections an exhibit to that what was an article demonstrating that Hino trucks are significant, I think 11 percent portion of the medium-duty truck market. Now, granted that was a snapshot for a particular year but it does demonstrate that Hino is a significant player in this market, it is not a trivial player. Hino in its brief suggests that that article was referring to a different Hino entity but it is not really clear why that is the case, why that wouldn't be in reference to Hino Manufacturing.

Finally just with respect to the point that Hino Manufacturing, the subpoenaed entity, hasn't been manufacturing for the entire class period, to the extent that they have no data and no information for part of the class period then there is no burden for them to say that.

Unless Your Honor has any further questions that's it?

THE COURT: No.

MR. SPERL: Thank you.

THE COURT: Thank you.

MR. SCHERKER: Very briefly, Your Honor, as to

KMMG. The unrebutted affidavit that we submitted refers to the total number of cars manufactured by KMMG, not sold by KMA, not sold under the Kia name, the total number of cars, and it is infetisimal compared to the 2.5 percent, the 2.5 percent supposed cap.

As to our convenience we are actually merely following the methodology laid out in Dr. House's declaration, which has never been challenged. I think it is important to pause for just a second, that the parties never challenged Dr. House's analysis, which very specifically explains that we look at market share over the entire period of the subpoena and that if we are not above a certain number -- if an individual entity is not above a certain number nothing useful is going to come of forcing that entity to go through the massive production which you have been hearing about all morning, much less the preliminary discovery and discovery. Nothing is to be gained. If nothing is to be gained from forcing KMMG to go through that exercise and nothing is to be gained from forcing KMA to go through that exercise separately, separate corporate entities, what is possibly to be gained by forcing them to both do it and then putting it all together? The smaller SSEs are not an exclusive club as to which a velvet rope got dropped at a certain point in time, it is a definitional decision driven by analytical data that has never been

challenged before this Court. Okay.

THE COURT: Okay. Thank you. Let me ask this question -- no, you may be seated. I think Mr. Williams --

MR. WILLIAMS: Thank you, Your Honor. I appreciate you letting me speak.

I just want to respond to Dr. House because it is a misleading issue because his analysis isn't tied to the fact that there are claims based on those purchases and the discovery is for the purpose of evaluating the overcharge and impact as to those purchases. What he's talking about is just in the abstract because they are smaller, it might not be statistically significant as to a broader analysis, but that's divorced from the point of we are alleging collusion as to those particular vehicles which is why the discovery is relevant as to those particular vehicles. That declaration does not relate to that point.

THE COURT: What are your largest vehicles, I mean groups, you've got Chrysler, GM --

MR. WILLIAMS: So, Your Honor, the way I would frame it is I always look at it in two ways, there are the larger vehicles -- if I may just grab a document -- and then there are the vehicles which are the largest subjects of collusion, so to us those are the ones we put in the front, we front load. Within that group are all of the defendants who are identified in the OEM deponent group in the Master's

order, meaning obviously -- I shouldn't say obviously, I apologize -- Toyota, Nissan --

THE COURT: What did you say first?

MR. WILLIAMS: Toyota, Nissan, Honda, Subaru, as we have talked about many times those are the entities who probably for the longest time and probably had the most prevalent conduct affecting their vehicles. However, at other parts of the period alleged in these cases Chrysler, Daimler, GM, Hyundai and Kia became the focus targets of collusion in these cases. So for us those are the primary OEMs, those are the ones we articulated that we thought should be at the front in terms of discovery, and there is the secondary smaller OEM group referred to in the order, and those are the ones that I would suggest most of the sales that will be at issue in this case are going to be focused on.

THE COURT: All right.

MS. KINGSLEY: I have one point, Your Honor, on behalf of HMMA.

I think it is important here, again, we get globbed together as families, we get globbed together as Hyundai and Kia. Mr. Williams just referenced sales of cars that are very important. KMMG and HMMA, HMMA who I'm representing today, do not sell vehicles to any --

THE COURT: You are talking about the Hyundai and

Kia group?

MS. KINGSLEY: Yes, Your Honor, but HMMA does not sell vehicles, HMMA manufactures vehicles, and so the defendants stood up and said we are focusing on the wrong number, we need to be focusing on vehicle sales. HMMA cannot focus on that nor can KMMG because those entities don't do that, they only manufacture vehicles.

THE COURT: Okay.

MS. KINGSLEY: I think that is important to realize that each of these entities that have been subpoenaed have very distinct purposes and functions that are getting lost in this process. Thank you.

THE COURT: All right.

MR. SURPRENANT: Sorry to pop up again, Your Honor. Dominic Surprenant. This time I'm speaking on behalf of the separate objections filed by the seven Daimler Truck entities.

We briefed -- our moving paper was document 1318, and our reply was document number 1379. I will be brief, I know it is late in the day.

Before the Special Master the truck and equipment plaintiffs did nothing, they did nothing. They signed the brief, they said we are represented, but what they didn't do is address the threshold requirement of relevance. The subpoena is designed for automotive manufacturers. The truck

entities, the Daimler Truck entities, don't make automobiles, they make commercial trucks, and both the case law that we cited and the declaration that we submitted, which is document 1227-29, explains that the Daimler Trucks are really individual custom-made vehicles.

What discovery, if we get there, will show is a truck and equipment dealer has a customer, the customer has literally hundreds, if not thousands, of options, and that truck or two or three or four trucks is made specifically for that individual customer. It is a completely separate model than the automotive model where you have a vehicle, you have a few trim levels and some options, and that's reflected in the manufacturer suggested retail price, it is a different industry.

And so the problem we had when we opposed their brief is we said before the Special Master is you didn't say anything, you did not explain, you didn't issue a word, you didn't write a word in your motion to compel why the subpoena would even elicit relevant information from the truck entities, and we put a declaration in saying it wouldn't, and the entire sum and substance before the Special Master of the truck and equipment was in the reply where they said in the face of our subpoena -- in the face of our declaration, Exhibit 1227-29, saying it is a completely different model. In the face of Supreme Court precedent recognizing that

commercial trucks are custom, specially ordered vehicles, they said well, yeah, it is true we didn't write a line in the motion to compel but it is relevant for all the same reasons it is relevant to the automotive entities. Well, that doesn't respond, that doesn't join issue.

So, Your Honor, with respect to the seven Daimler Truck entities before the Special Master that was not even a threshold showing of relevance, absent a showing of relevance one cannot determine proportionality because we have no idea why they want discovery from us.

Now, in their briefing before Your Honor they put in -- they made new arguments for the first time and they put in a highly general declaration from an economist, Dr. Riser (phonetic). And as we pointed out at page 7 in our reply, document number 1379, at pages 6 and 7, absent extraordinary circumstances a party is limited to the record they establish before the Special Master when they appeal to Your Honor. What we cited I believe is Michigan -- Eastern District of Michigan precedent, and there is no extraordinary circumstances.

So with respect to the seven Daimler entities, my first argument is they should be stricken, they should not be included, the truck and equipment plaintiffs completely failed to show why any discovery is even relevant and therefore they cannot show proportionality.

As a backup, Your Honor, again, because I'm trying to be constructive, I would suggest that if Your Honor doesn't simply strike the seven Daimler Truck entities that the umbrella organization, Daimler Trucks of North America, answer 20 or 25 written questions that we can meet and confer on, and that there would be 100 percent cost shifting in that enterprise if it is not stricken.

And unless Your Honor has any questions, that's my argument on behalf of the Daimler Truck entities?

THE COURT: Thank you.

MR. WIENNER: Tom Wienner for Hino.

Your Honor, I wanted to respond very quickly about what was said about Hino in the -- by counsel for the truck and equipment dealers. Your Honor, the only information that the parties have put in front of the Court to suggest that Hino has a statistically significant share of the medium-duty truck market is an article that he referred to from a website called truckinginfo.com that focuses on sales, not manufacturing, sales in one year of two classes of medium-duty trucks, the year is 2013, the classes are classes six and seven of medium-duty trucks. To suggest -- and the percentage attributed to the Hino sales in that one year for those two classes was 11 percent, but to suggest that that number means that Hino Motors Manufacturing had a significant share of the medium-duty truck market for the five classes in

that market for the 12-year period in which Hino has participated in the market is ridiculous. It would -- 11 percent is -- would vastly overstate Hino's share of that market.

Moreover, it is clear that although the author of that article on the website refers only to Hino, it is clear from the numbers he's using that he's not talking about my client, Hino Motors Manufacturing USA, Inc., he's talking about a separate entity, Hino Motor Sales USA, Inc., which has never been subpoenaed and is not before this Court. The correct number to look at if we are talking about the medium-duty truck market, Your Honor, is 3.7 million vehicles in classes four through eight from the years that Hino has been in that market, 2003 through 2015. Of those -- and that's an approximate number, the actual number is 3,685,987 medium-duty trucks manufactured in the United States in those 12 years, of that number Hino manufactured 67,908, which is 1.8 percent. In other words, we are smaller than some of the other smaller OEMs which has been carved out of the Special Master's order and to which there has been no objection. It was quite correct for the Special Master to treat us the same way.

THE COURT: All right.

MR. SPERL: Your Honor, Andrew Sperl for the truck and equipment dealers.

I'm going to address the arguments relating to the Daimler Truck entities, as I will call them the seven entities identified --

THE COURT: You will call them what?

MR. RAITER: The Daimler Truck entities, the seven entities identified by Mr. Surprenant.

So there is a procedural argument here and then I think there is a more substantive argument. The procedural argument has to do with whether or not it was proper for us to join in the briefing by the parties before the Special Master and whether that was sufficient for us to establish our burden of relevance. I would submit that there can't really be a serious argument that there is a problem merely with the fact that we joined a brief because this is a big case, people join in briefs frequently, and particularly given the unique way in which these subpoenas arose with the parties coming together and issuing them collectively it was appropriate for there to be a common brief.

But setting aside a technical procedural issue, I will assume that counsel for the Daimler Truck entities would also suggest that even if we had submitted a brief that said in substance basically the same thing as the parties' collective brief but we did it ourselves that that would still be insufficient as I understand the argument because it doesn't talk specifically about trucks, and I would submit

that that's not correct because for the reasons that were in the parties' brief the documents and data that we seek from the Daimler Truck entities are necessary to show the overcharge to those entities and the pass on of that overcharge to our clients, the dealers, and that's not really any different than it is in any other type of case of this nature where you are talking about price fixing and then a passthrough. It doesn't even have to be vehicles for that general proposition to hold true.

Now, certainly, and this goes to counsel's waiver argument, you know, certainly Daimler Trucks has the right to suggest that despite that -- despite that, we nonetheless need to say more about trucks but they didn't do that in any effective way. The only -- the main point that Daimler Trucks makes is that trucks are more custom built than are automobiles. We concede that, we say that in our own briefing, but that doesn't mean you don't need data from the manufacturer of the part to the OEM and that you don't need documents and data reflecting sales from the OEM to the dealers to establish the elements of this case, nor does Daimler Trucks effectively establish that we aren't able to somehow show that there was an overcharge and show that there was passthrough.

The only thing that was established by them is that trucks are different for this reason that they can be

customized, which is something we don't dispute, and for the reasons as we indicate in our brief that makes it all the more important that we have these data.

The Supreme Court cases that Mr. Surprenant references again, other than establishing this point that trucks are different for those reasons, are really inapposite, they don't have anything to do with discovery. One of them has to do with -- not with even the type of price fixing that's in this case, the Volvo case.

One more word on the waiver issue and whether you can consider the affidavit and declaration that we submitted on these objections. Before the Special Master in opposition to the parties' motion to compel the Daimler Trucks entities basically just made the same point that I just indicated in the page, that trucks are different. They didn't say that the fact that trucks are different make it impossible for us to show overcharge or passthrough. There is a declaration that was submitted but the declaration is also fairly conclusory and it essentially says again that these are more customized vehicles. Essentially the Daimler Truck entities really didn't do anything to suggest that our initial showing of relevance was insufficient because not much was said by the Daimler Truck entities in their brief before the Special Master initially, we met that in our reply by explaining why their authority was inapposite and why the fact that these

were customized vehicles means that we need the discovery all the more. Thank you, Your Honor.

THE COURT: Thank you.

MR. SURPRENANT: I will be brief, Your Honor.

THE COURT: Really?

MR. SURPRENANT: Your Honor, they could have joined the brief, they could have written a separate brief. What they had to do is to explain why a subpoena that was specifically crafted for automotive -- automobile -- passenger automobiles were relevant to their dramatically different commercial truck industry. They really needed to write a separate document demand and to explain why they could get information. They didn't, they didn't. They said it is relevant for all the same reasons. It is not that the commercial trucks are somewhat more custom, they are completely custom, they are designed literally for individual customers with hundreds, if not literally thousands, of options, so what that means is we need at least an explanation from the truck and equipment plaintiffs. Yes, we understand that this is an automobile subpoena but here specifically why it is relevant and proportionate, we got nothing, we got one line in a reply it is relevant for all the same reasons.

So I think they have wholly failed to show relevance and proportionality, it should be stricken, and in

the alternative, Your Honor, I would suggest the proposal I made in my opening comments, which is written questions and whatever is the cost shifting. Thank you, Your Honor.

THE COURT: All right. I guess --

MS. AVERY: Your Honor, may I be heard?

THE COURT: Come on up.

MS. AVERY: Good afternoon, Your Honor. My name is Jessica Avery, and I represent Kia Motors America and also Hyundai Capital America.

I just wanted to respond to a point that we have heard raised numerous times here at the hearing and previously raised by the parties that they simply do not know what information the non-cores or domestic distributors would have and therefore they need these depositions regarding what information that is, where it would be found and what the burdens are. That representation is just simply not correct.

I would direct you to the HCA, Hyundai Capital America, declaration, which is quite detailed and outlines as follows: They provide both floor plan financing for the sale of vehicles from the distributor to the dealership, they also provide consumer financing for the sale of vehicles from the dealership to the consumer. In both instances the dealership is involved with the purchasing and sale of this information. The information about the price is simply reflected in financing documents that are provided to HCA. The dealership

has this information. The dealership would have HCA and similar non-core entities undertake substantial burdens to obtain and produce information that the dealership already has.

Specifically in this declaration it continues that there are electronic documents and also there are a host of documents in storage that are physically stored. There are over 1.5 million live accounts that will require an electronic search. In addition to that, there are over 23,000 boxes in storage containing physical documents that need -- would be hand searched, over 1,000 of those apply to floor plan financing, over 22,000 boxes contain consumer financing documents.

It is almost impossible to gauge the cost to do a full search of compliance with this extremely overbroad subpoena. So what we have done and what we could do is provide an estimate to simply have these 23,000 documents that reflect the consumer financing portion of the sales documents, to have those physical boxes pulled from storage and staged for review would be $194,000. That is merely to take boxes from storage and have a company lay them out to then undertake the enormous task of searching these documents. That figure would also not include the cost and the burden and expense to go through the 1.5 million live accounts. So you are dealing with significant burdens here,

and I have yet to hear from the parties what substantial need they have for this type of information that, A, they already have, and B, that these very limited involvement by the non-cores should be provided and why they should undertake the efforts to obtain these documents is simply not proportional.

Thank you, Your Honor.

THE COURT: Thank you. All right. What this tells me is we are getting nowhere in this case. It really bothers me that we have had this going on for over a year and we don't have the basic discovery that is at the core of this litigation, and I think that to continue to litigate all of this simply at this point is a waste of time. I think we need to look at what can we do to proceed in this action.

I am going to set aside the Master's order. I believe that the rules require that a Rule 45 subpoena be issued for non-party depositions. I am going to limit this information that you have -- the basic areas that were outlined in these orders, both the ones submitted by the parties and the ones submitted by the non-parties. I don't think you are that far apart in what you are asking for now that -- at least now that I understand you really are looking for where is this information that relates to these particular areas.

So what I'm going to do is I'm going to require, if

you wish, for the parties to submit Rule 45 subpoenas with an outline of the questions to be asked to the larger non-party groups, that would be Chrysler, GM, Toyota, Nissan, Honda. At this point I'm going to exclude the Daimler Trucks and all of the non-core groups and the rest of the manufacturers. I think we need to start with getting some information here. We need to move on. And this -- these -- or this discovery is discovery on discovery as the Master had ordered, and it will then go back to the Master for his determination on the main motion.

In terms of the smaller groups and the non-core and Daimler Trucks, et cetera, those other groups, they are -- I'm not barring their subpoena at a later date, I'm simply saying at this point we are starting with these groups so that we can move along. We need to narrow this so we can get some answers. I think that your narrowing the non-parties -- oh, Subaru was the other one, did I say Subaru?

MR. WILLIAMS: You did not mention Subaru.

THE COURT: But Subaru.

MR. RAITER: Are they in the group that will go forward?

THE COURT: They will go forward. Did I miss any of the other main parties, Mr. Williams? I'm sorry. I didn't intend to even do this until after listening to your argument so --

MR. WILLIAMS: I think you have included in the group to go forward Chrysler, GM, Toyota, Nissan, Honda and Subaru?

THE COURT: Correct.

MR. WILLIAMS: You said you referred to the smaller that I took that to mean Kia and Hyundai?

THE COURT: Yes.

MR. WILLIAMS: Thank you.

THE COURT: You are not going forward with the smaller --

MR. WILLIAMS: Correct.

THE COURT: Right. Okay. My intent is that if you get this information and you can get it to the Master and you can then move ahead on the main motion that by getting some information from these non-parties you are going to know where you are going and what you are going to get, and I hope that would even open up or enlighten you as to these other non-parties that I have -- I guess the word used in these is carved out at this point in time. So this isn't to say this is banded, I don't mean to say that, I'm just saying I want you to move forward, we have got to move this case forward. Okay.

Is there anything else that I should consider here beside costs?

MR. HEMLOCK: One quick point, Your Honor. So in

the spirit of moving things forward, Special Master Esshaki had ordered the parties to reach out to the OEMs to start scheduling the depositions pending the result of today's hearing, and there is -- Special Master Esshaki's order had accounted for the fact or had considered that 30 days from whenever you would decide those depositions would start, they would go on for a 45-day period. Is it possible that Your Honor's order today could keep that schedule and that way move --

THE COURT: Yes. I'm going to ask you to prepare the order so you look at all the different specifics in both orders. I'm not trying to eliminate anything here, and I know there are probably some things I didn't consider because I don't have it written out but, yes, I think that's very practical.

In terms of the outline for the questions to be asked, I would like to make that -- I just want to note for the record that that's an outline, that doesn't mean you can't, you know, do follow-ups and maybe something else comes to mind, and if it isn't in the outline let the objection be noted in the deposition, that's all, and then you will continue.

In terms of, you know, the length of the outline I'm not limiting you, you're the ones who have to prepare it and you know much better than I do what information you need,

so I am not limiting it, you know, I may get some objections, I hope not, I hope we can go forward. I hope that any substantive objections or if a non-party has an objection to a particular question that that is put forth at the deposition and on the record and that can be ruled on later.

I think that's all that you had.

MR. HEMLOCK: Thank you.

THE COURT: In terms of costs, that's much more difficult and I was being facetious in saying you all pay your own costs but I'm not far off. I think that ultimately I'm not going into who is responsible for delay because I have spent hours reading all of your e-mails and the information in the briefs and it could go either way who is at fault. I'm not going to be here to lay fault because we have way too much to do to start dealing with that so, you know, ultimately I know that the party asking for the information is the one who pays the cost but I'm not really going to rule on that now, I just want you to be aware of my feelings. I know that once you get to the substantive orders and the actual production then that's going to be another issue.

The costs -- let me address this, the costs of actually attending the depositions, that cost will at a minimum be split between the parties and the non-parties at a minimum, and I may hear later that it should be more but I'm

saying at least that cost you know is going to be split.

Okay. Anything else? Mr. Williams, anything that you can think of?

MR. WILLIAMS: Nothing comes to mind, Your Honor.

THE COURT: I know this is a different result but I hope it tells you how I do intend to push this. We have got to move on in this case. Thank you very much. I appreciate it.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 4:22 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Thursday, June 23, 2016.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 07/01/2016

Detroit, Michigan